COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2912-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PAUL TAYLOR,

DEFENDANT-APPELLANT,

MICHAEL L. PATTERSON,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Paul Taylor appeals from a judgment of conviction for attempted armed robbery in violation of § 943.32, STATS. Taylor

presents two issues for our review: (1) whether the lineup procedure was impermissibly suggestive; and (2) whether there was insufficient evidence to prove attempted armed robbery because no weapon was used or threatened. We conclude that the lineup procedure was not impermissibly suggestive, and that the evidence was sufficient to convict Taylor. Therefore, we affirm.

I. BACKGROUND.

Taylor's conviction resulted from an attempted robbery of an Amoco gas station. Taylor entered the gas station with co-defendant Michael Patterson. The victim, Jarren Summerville, was working behind a bulletproof cage. Taylor and Patterson demanded money from Summerville; Taylor was holding a tire iron and kicked the cage door, while Patterson claimed that he had a gun.

Summerville positively identified Taylor in a photo array, and both Taylor and Patterson were positively identified in a lineup with three non-suspects. Taylor brought a motion to suppress the lineup identification evidence which the trial court denied. Taylor also brought motions after verdict which were also denied. Taylor now appeals.

II. ANALYSIS.

A. Lineup procedure.

1. Standard of review.

Taylor first claims that the trial court erred by denying his motion to suppress identification evidence obtained as a result of the lineup. Taylor claims that the lineup procedure was impermissibly suggestive. We disagree and

conclude that the lineup procedure was not impermissibly suggestive, and thus, that Taylor has failed to meet his initial burden.

Whether a lineup is impermissibly suggestive is a constitutional question that this court determines *de novo*. ***State v. Kaelin***, 196 Wis.2d 1, 10, 538 N.W.2d 538, 541 (Ct. App. 1995). A criminal defendant is denied due process when identification evidence admitted at trial stems from a pretrial police procedure that is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." ***Simmons v. United States***, 390 U.S. 377, 384 (1968); ***State v. Wolverton***, 193 Wis.2d 234, 264, 533 N.W.2d 167, 178 (1995). A criminal defendant bears the initial burden of demonstrating that a lineup was impermissibly suggestive. ***State v. Mosley***, 102 Wis.2d 636, 652, 307 N.W.2d 200, 210 (1981); ***Powell v. State***, 86 Wis. 2d 51, 65, 271 N.W.2d 610, 617 (1978). If the defendant meets the initial burden, the burden shifts to the state to demonstrate that "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." ***Manson v. Brathwaite***, 432 U.S. 98, 106 (1977). However, if the defendant fails to meet the initial burden, the court need not inquire into the reliability of the identification. ***Kaelin***, 196 Wis.2d at 10, 538 N.W.2d at 541.

2. Alleged lineup defects.

Taylor claims that the lineup procedures were improper because there were no other participants who were similar in physical size and build to himself, and because Patterson was a participant. Taylor specifically claims that the lineup was impermissibly suggestive because he was the tallest participant, and because the only person who weighed more than he did was Patterson.

The Wisconsin Supreme Court stated in ***Wright v. State***, 46 Wis.2d 75, 175 N.W.2d 646 (1970), that "[t]he police are not required to conduct a search for identical twins in age, height, weight or facial features." ***Id***. at 86, 175 N.W.2d at 652. All that is required is that there is an "attempt to conduct a fair lineup, taking all steps reasonable under the 'totality of the circumstances' to secure such result." ***Id.*** at 86, 175 N.W.2d at 652.

At the suppression hearing, testimony revealed that one of the three non-suspects in the lineup was only an inch shorter than Taylor and weighed the same as Taylor, that all the men were of the same race, and that there was only a twenty pound variation between the heaviest and lightest participant. Additionally, Taylor has failed to include the photographs of the lineup and the lineup reports in the appellate record. An appellant has a duty to see that material evidence is included in the record and Taylor's failure to include such evidence allows this court to assume that if the information had been included in the record, it would support the trial court's decision. ***State v. Heft***, 178 Wis.2d 823, 825-26, 505 N.W.2d 437, 438 (Ct. App. 1993). The trial court found that although the participants "don't look identical," there was enough "commonality" in their appearance. Based on the suppression hearing testimony and Taylor's failure to include any other material evidence, we agree with the trial court and conclude that Taylor has failed to meet his burden to show that the lineup was "impermissibly suggestive."

B. Sufficiency of the evidence.

1. Standard of review.

When the sufficiency of the evidence is challenged on appeal, the issue is whether the trier of fact, acting reasonably, could be convinced by the

evidence to the required degree of certitude. ***State v. Poellinger***, 153 Wis.2d 493, 503, 451 N.W.2d 752, 756 (1990). The test is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether this court can conclude that the trier of fact could, acting reasonably, be so convinced by evidence it had a right to believe and accept as true. ***Id.*** at 503-04, 451 N.W.2d at 756. The credibility of the witnesses and the weight of the evidence is for the trier of fact. ***Id.*** at 504, 451 N.W.2d at 756. We must view the evidence in the light most favorable to the finding. ***Id.*** Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted. ***Id.*** Reversal is only required when the evidence, considered most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact acting reasonably could have found guilt beyond a reasonable doubt. ***Id.*** at 507, 451 N.W.2d at 757-58.

2. Evidence was sufficient.

The State was required to prove, beyond a reasonable doubt, that Taylor, during the attempted commission of a robbery, used or threatened to use a dangerous weapon, or any article "used or fashioned in a manner to lead the victim reasonably to believe that it is a dangerous weapon." Section 943.32(2), STATS.; *see* ***State v. Moriarty***, 107 Wis.2d 622, 630-31, 321 N.W.2d 324, 329 (Ct. App. 1982).

Taylor attacks the sufficiency of the evidence based upon the fact that Summerville stated that Taylor never used the tire iron in a threatening

manner.[1] Taylor's trial attorney asked Summerville, "Didn't you tell the police that (Taylor) never used this crowbar or tire iron in a threatening manner during the element of the crime?" Summerville answered, "Yes, I told him that." Based upon Summerville's admission, Taylor claims that the jury could not find that the tire iron was used in a manner capable of producing death or great bodily harm.

Summerville, however, also testified that he feared for his safety and was scared during the attempted robbery. The district attorney asked the victim, "You were fearful for your safety during this time?" and Summerville answered, "Yes." Taylor had the tire iron in his hands when he kicked the locked door in an attempt to enter the bulletproof cage protecting the victim. Although Taylor may have only displayed the iron, that action, coupled with his aggressive manner, was sufficient to constitute a threat to use a weapon which the victim would reasonably believe to be dangerous. Taylor's accomplice, co-defendant Patterson, also stated that he had a gun. Thus, Taylor and the co-defendant were acting in a threatening manner and the jury could reasonably conclude that they would use further force to gain the money.

In sum, Taylor was in possession of and displayed a tire iron, demanded money, and kicked the locked door protecting the victim, while Patterson stated that he had a gun. There was sufficient evidence for a jury to

[1] The State argues that Taylor should be judicially estopped from contesting the sufficiency of the evidence with respect to the attempted armed robbery charge because Taylor requested that the lesser-included offense of attempted unarmed robbery charge not be submitted to the jury. We conclude that the evidence is sufficient to support the verdict; therefore, we decline to address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (If a decision on one point disposes of appeal, appellate court will not decide other issues raised.).

reasonably conclude that Taylor used or threatened to use the tire iron in a manner to lead the victim to reasonably believe that it was a dangerous weapon.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.